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No. 03-129

IN THE

Supreme Court of the United States

PUERTO RICO AND THE CARIBBEAN CARDIOVASCULAR CENTER CORP.,

Petitioner,

v.

FRESENIUS MEDICAL CARE CARDIOVASCULAR RESOURCES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Fresenius Medical Care Cardiovascular Resources, Inc. is fully owned by Fresenius Medical Care Cardiovascular Resources Holdings, Inc.

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INTRODUCTION

Plaintiff/Respondent Fresenius Medical Care Cardiovascular Resources, Inc. ("FMC" or "Respondent")[1] respectfully submits this Opposition in response to the Petition for Writ of Certiorari ("Petition") filed by Defendant/Petitioner Puerto Rico and the Caribbean Cardiovascular Center Corp. ("PRCCCC").

PRCCCC's Petition presents three questions for review.

First, PRCCCC asks whether, under *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997), federal courts must give "substantial deference" to the legislative and policy decisions made by a state in structuring an entity. PRCCCC argues that the courts **must** defer to state law in deciding whether an entity was intended to be an arm of the state and, further, that the First Circuit's analysis is flawed because it fails to give adequate deference to the Commonwealth of Puerto Rico's decisions regarding PRCCCC. These arguments are legally and factually devoid of merit. The state legislature's subjective intent at the time it drafted PRCCCC's enabling statute, although instructive, is **not** controlling. Furthermore, the First Circuit carefully considered PRCCCC's enabling statute and other state law and properly concluded that the Commonwealth did not structure PRCCCC as an arm of the state for Eleventh Amendment purposes.

Second, PRCCCC asks whether the federal circuits' interpretation of *Hess* is consistent with this Court's later

1. The Petition for Writ of Certiorari incorrectly identifies Respondent as Fresenius Medical Care Cardiovascular Center Corp.

rulings that emphasize the need to protect a state's "dignity interests." According to PRCCCC, the First Circuit's arm-of-the-state analysis improperly gives dispositive weight to whether a state would be responsible for the financial obligations of an entity. Again, PRCCCC's argument lacks merit. *Hess* expressly recognizes the "vulnerability of the State's purse" as the "most salient" factor in the arm-of-the-state analysis. And, the federal circuits consistently hold that the most important factor in determining whether arm-of-the-state status applies is the impact on the state treasury.[2] Later cases decided by this Court did not abrogate this rule. Furthermore, the First Circuit expressly considered the dignity interests that might be implicated in reaching its conclusion that PRCCCC was not entitled to Eleventh Amendment immunity.

Third, PRCCCC asks whether a specialized medical care, research and training facility established by the state legislature, integrated into Puerto Rico's public health care system and to some degree funded and indemnified by Puerto Rico should be deemed an arm of the state. PRCCCC argues that it should; but this argument is without any legal authority and is based on a distorted interpretation of the First Circuit's opinion. The First Circuit's holding does not give rise to this question. The court did not imply, let alone hold, that special purpose public entities can **never** be an arm of the state. It simply concluded that the facts in **this case** did not support the conclusion that PRCCCC performed governmental functions.

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2. The only possible exception is the Seventh Circuit in *Thiel v. State Bar of Wisconsin*, 94 F.3d 399, 401 (7th Cir. 1996) (declining to decide if the most important factor in Eleventh Amendment determination is the impact of a judgment on the state treasury).

The gist of PRCCCC's arguments — and its (purported) compelling justification for why this Court should review the First Circuit's decision — is that the federal circuits are in "substantial disarray" over the application of this Court's arm-of-the-state analysis set forth in *Hess* and *Regents*, and that the First Circuit's own analysis was flawed. PRCCCC urges this Court to "clarify" the standard for determining when an entity is an arm of the state for Eleventh Amendment immunity purposes or risk a "further fracture and fragmentation" among the circuits. In truth, PRCCCC is requesting the Court to **change** the Supreme Court's controlling arm-of-the-state test.

As developed below, the First Circuit's opinion is grounded firmly upon the factual record and the law; and its decision that PRCCCC is not an arm of the state entitled to Eleventh Amendment immunity is proper in all respects. This Court's arm-of-the-state analysis, as set forth in *Hess* and reaffirmed in *Regents*, provides that where objective indicia of immunity point in different directions, the court should assess whether the state will be liable for a judgment against the entity. The First Circuit applied this test and, finding that the indicia of immunity weighed both for and against a finding of immunity, looked to the impact on the state treasury. It concluded that the Commonwealth would not be obligated for a judgment against PRCCCC and, therefore, PRCCCC was not entitled to Eleventh Amendment immunity.

Also contrary to PRCCCC's assertion, there is no division among the courts of appeals justifying review of the decision in this case. The Supreme Court has established a general framework for determining whether an entity is an arm of the state for purposes of Eleventh Amendment

immunity, articulating various factors or "indicators" of immunity to consider in the analysis. Any seeming variance between the circuits has been exaggerated by PRCCCC. The federal circuits have consistently sought to follow *Hess* and its progeny, and a review of the circuits' decisions establishes that they are in substantial harmony.

This Petition is simply the last in an endless stream of efforts to avoid litigating the underlying case on the merits. Respondent therefore respectfully urges this Court to deny the Petition for Writ of Certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

This action involves a dispute over PRCCCC's obligations under an Agreement for Open-Heart Services dated January 1, 1998 (the "Agreement") between FMC and PRCCCC. On September 28, 2001, FMC filed a complaint in the United States District Court in Puerto Rico against PRCCCC for breach of the Agreement as well as breach of the implied covenant of good faith and fair dealing, specific performance, and declaratory judgment. App. at 3a.[3]

On or about November 13, 2001, PRCCCC moved to dismiss the complaint on the grounds that: (1) the Court lacked *in personam* jurisdiction over PRCCCC because the individual who received the summons and complaint was not authorized to receive service of process; (2) FMC lacked standing to sue because the name Fresenius Medical Care Cardiovascular Resources, Inc. did not appear in the original contract with PRCCCC; and (3) PRCCCC is immune from

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3. All references to the Appendix ("App.") shall be to the Appendix included in PRCCCC's Petition.

suit in federal court under the Eleventh Amendment because it is an arm of the Commonwealth. *Id.*

The district court denied PRCCCC's motion to dismiss in its entirety by way of an opinion and order dated March 18, 2002. *Id.* The district court found, as a matter of law, that service of process was proper, that FMC had standing to sue, and that PRCCCC does not enjoy Eleventh Amendment immunity. App. at 4a.

PRCCCC filed two motions for reconsideration of the Court's decision, both of which were denied in an opinion and order dated May 7, 2002. *Id.*

On May 21, 2002, PRCCCC filed an interlocutory appeal in the First Circuit Court of Appeals, seeking a reversal of the district court's March 18 and May 7 opinions and orders. *Id.* Reviewing *de novo* the district court's conclusion in light of the Supreme Court's decisions in *Hess* and *Regents*, *supra*, the First Circuit affirmed the district court's decision that PRCCCC is not an arm of the state entitled to Eleventh Amendment immunity. App., at 37a.[4]

Following an unsuccessful petition for rehearing *en banc* by the First Circuit, PRCCCC now appeals to this Court to decide the issue.

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4. The First Circuit also recognized PRCCCC's dilatory behavior, which has plagued this case from the beginning. *See* App. at 5a n.3 ("[T]he conduct of [PRCCCC] evidences a pattern of causing delay in this litigation, both in this court and the district court, including missing filing deadlines after those deadlines were extended.").

REASONS FOR DENYING THE PETITION

I. The First Circuit Properly Applied This Court's Arm-Of-The-State Analysis As Set Forth In *Hess v. Port Auth. Trans-Hudson Corp.* And *Regents Of The Univ. Of Cal. v. Doe*

The Petition purports to seek resolution of what qualifies an entity as an arm of the state for purposes of Eleventh Amendment immunity.[5] The analysis to be applied, however, has been clearly set forth in two recent decisions: *Hess v. Port Auth. Trans-Hudson Corp.* and *Regents of the Univ. of Cal. v. Doe.*

In *Hess*, the Supreme Court was asked to determine whether a bistate entity created under the Compact Clause of the U.S. Constitution — the Port Authority of New York and New Jersey — was an arm of the state entitled to Eleventh Amendment immunity.[6] Beginning with the presumption that a Compact Clause agency does not qualify

5. The Eleventh Amendment provides states with immunity from suit in federal court without their consent. U.S. Const. amend. XI. This Court has taken a broad view of sovereign immunity, interpreting the Eleventh Amendment to bar suits not only against a state but against an entity that acts as an arm or alter ego of the state. *Regents*, 519 U.S. at 429; *Poindexter v. Greenhow*, 114 U.S. 270, 287 (1885); *In re Ayers*, 123 U.S. 443, 487 (1887); *Smith v. Reeves*, 178 U.S. 436, 438-39 (1900); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945).

6. PRCCCC suggests, for the first time, that *Hess* may not apply to intra-state entities. This argument should be disregarded. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to address argument raised for first time in petition for cert). In addition, the argument is both illogical and unfounded. *See Auer v. Robbins*, 519 U.S. 452, 456 n.1 (1997) (briefly applying *Hess* to intra-state entity to find no immunity).

for immunity "'unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves . . . ,'" the Court set forth a two step analysis. 513 U.S. at 43-44 (quoting *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 410 (1979)). Thus, the Court began its arm-of-the-state analysis by first evaluating whether the state structured the entity to enable it to enjoy the protections afforded by the Eleventh Amendment. 513 U.S. at 44. Factors or "indicators" of immunity considered by the Court in its evaluation included: (1) the extent of state control over the entity; (2) characterization of the entity under state law (both legislative and case law); (3) functions performed by the entity; and (4) the extent of the state's financial responsibility for the entity's debts, including judgments. *Id.* at 44-46.

Finding that these indicators pointed in different directions, the Court explained that "the Eleventh Amendment's twin reasons for being" — preserving a state's dignity and financial solvency — should serve as the "prime guide." *Id.* at 47. Reasoning that suit in federal court would not be an affront to the dignity of a Compact Clause entity or the states that created it because such entities are created constitutionally by **both** state and federal governments, *see id.* at 41-42, the Court looked at whether a judgment would be paid out of the state's treasury. The Court recognized this factor — the risk to the state treasury — as "the most salient factor in Eleventh Amendment determinations." *Id.* at 48.

More recently, the Court revisited the issue of who is entitled to Eleventh Amendment immunity in *Regents*. This time the Court granted certiorari to address the "narrow question" of whether the federal government's agreement to

indemnify a state instrumentality against the costs of litigation, including an adverse judgment, divests the state agency of Eleventh Amendment immunity. 519 U.S. at 426. The answer required the Court to resolve a division among the circuits as to whether courts should focus on legal, or financial, liability when evaluating the extent of a state's responsibility for an adverse judgment. The Court reaffirmed that "the question whether a money judgment against a state instrumentality . . . would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity. . . ." *Id.* at 430. It held, however, that the presence or absence of a **third party's** undertaking to indemnify the agency is irrelevant to the outcome. *Id.* at 431.

PRCCCC urges the Court to revisit these decisions and review the First Circuit's application of them to the facts of this case. This request should be denied. The First Circuit applied *Hess*, *Regents* and the cases that followed properly and in a manner that is consistent with the approach of the other circuits. Indeed, rather than having its decision questioned, the First Circuit's analysis and result should be applauded.

A. The First Circuit Gave Sufficient "Deference" to State Law

PRCCCC argues that the First Circuit did not give adequate deference to the state's characterization of PRCCCC but instead narrowly interpreted the enabling statute, ignored relevant provisions and established a presumption against a finding of Eleventh Amendment immunity.[7] A review of the First Circuit's opinion reveals that nothing could be farther from the truth.

7. PRCCCC also complains that the First Circuit imposed a burden of proof on PRCCCC that was too stringent. PRCCCC cites (Cont'd)

First, the First Circuit began its analysis by expressly acknowledging that *Hess* required it to consider how the Commonwealth structured PRCCCC:

> **The first step of the analysis concerns how the state has structured the entity**. This step, we think, pays deference to the state's [dignity] interest in extending or withholding Eleventh Amendment immunity from an entity. After all, a state may easily make clear by statute its view that an entity is to share the state's immunity. Where the state has not made a clear statement, its dignity interests are nonetheless protected by an examination of the structure the state has chosen to establish. **In evaluating whether the state had structured an agency to be an arm of the state, *Hess* looked at 'various indicators of immunity or the absence thereof.'**

App. at 15a (quoting *Hess*, 513 U.S. at 44) (emphasis added).

Second, the First Circuit applied the *Hess* factors and carefully considered whether the Commonwealth structured PRCCCC to share its sovereignty. It reviewed: (1) Puerto Rico's enabling statute (App. at 23a-24a) (recognizing factors that weighed in favor of immunity but concluding that statute

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(Cont'd)

no legal authority in support of its argument, which is wholly without merit. It is well settled that a party seeking to establish Eleventh Amendment immunity bears the burden of proof. *Wojcik v. Mass. State Lottery Comm'n*, 300 F.3d 92, 99 (1st Cir. 2002); *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir. 2002); *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999), *cert. denied*, 528 U.S. 1005.

"does not by its terms structure PRCCCC to be an arm of the state"); (2) other Commonwealth statutes (App. at 24a-26a) (rejecting contention that definition of "public funds" in 33 P.R. Laws Ann. § 3022 (11), (14) made all public corporations in Puerto Rico arms of the state and rejecting argument that PRCCCC employees are public employees under the Penal Code of Puerto Rico); and (3) other Commonwealth law (App. at 26a-27a) (noting there were no state court decisions holding that PRCCCC is an arm of the state). The First Circuit also considered the functions performed by PRCCCC and the amount of control exerted by the Commonwealth over PRCCCC. App. at 27a-30a. All of these factors — state characterization of an entity, the extent of state control and the entity's functions — were recognized by this Court in *Hess* as relevant to the arm-of-the-state analysis. 513 U.S. at 44-46.

Third, the state's view — even if clear — is not controlling. As noted by the First Circuit, the "ultimate issue is still a federal question for the courts to decide." App. at 16a. The circuits are in agreement with this fundamental premise. *See Harter v. Vernon*, 101 F.3d 334, 342 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120 (1997) (courts may defer to state court rationale but holding is not dispositive); *Gray v. Laws*, 51 F.3d 426, 437 (4th Cir. 1995) (cautioning against overreliance on state court decision if "there is no reasoning provided for the . . . court's conclusion."); *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 978 (10th Cir. 1997) (state court decision not dispositive on issue of Eleventh Amendment immunity); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 991 F.2d 935, 942 (1st Cir. 1993) (same). Although PRCCCC professes that it is not seeking total deference to state legislative and policy decisions, that is precisely what it is asking this Court to do. Neither *Hess* nor *Regents*, however, requires federal courts to defer entirely to

how the state structured an entity; these cases require that courts "consider[] the provisions of state law that define the agency's character." *Regents*, 519 U.S. at 430 n.5. This is exactly what the First Circuit did. That PRCCCC disagrees with the outcome is not a basis for further review.

B. There is No Presumption in Favor of Granting Arm-of-the-State Status

In its Petition, PRCCCC suggests that this Court's decisions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *FMC v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) ("*Federal Maritime*") create a presumption in favor of arm-of-the-state status. FMC respectfully disagrees that these decisions apply to the issue at bar or that they support the presumption asserted by PRCCCC. They do not address **who** is entitled to Eleventh Amendment immunity. Rather, they address the extent of such immunity.

Thus, in *Federal Maritime*, there was no dispute that the state port agency was entitled to Eleventh Amendment immunity from private suits in federal court. The question was whether this protection extended to administrative proceedings. This Court held that it did, reasoning that the affront to state dignity that would result from being haled into federal court was no less where the tribunal was administrative. 535 U.S. at 760. The case does not hold, however, that in determining whether an entity is an arm of the state, a presumption in favor of such status applies. Similarly, *Seminole Tribe* held that Congress did not have authority to abrogate a state's Eleventh Amendment immunity. 517 U.S. at 51. It did not address the standard under which an entity is found to be an arm of the state and did not hold that a presumption in favor of such status protects state dignity interests.

C. The First Circuit Did Not Take an All or Nothing Approach

Following the Court's lead in *Hess*, the First Circuit applied a two-step analysis to determine whether PRCCCC was an arm of the state. First, it considered how PRCCCC had been structured under state law. Then, upon finding that the structural indicators pointed in different directions, the Court proceeded to the next step — considering the risk to the state treasury should a judgment be entered against PRCCCC.

PRCCCC argues that the First Circuit misapplied the first step of the *Hess* analysis. According to PRCCCC, the First Circuit improperly required **"all"** of the indicia to point to arm-of-the-state status before granting Eleventh Amendment immunity. In sole support of this argument, PRCCCC cites to the following language from the opinion: "We cannot say the indicia all point in the direction of PRCCCC being an arm of the state and so we reach the second stage of the analysis."[8]

PRCCCC grossly misinterprets the First Circuit's analysis as taking an "all or nothing" approach. The First Circuit did not require that all indicia favor a determination that an entity is an arm of the state; indeed, if this were the case, the inquiry would have stopped after the first step as there would have been no need to proceed to the second step of the analysis. This Court recognized in *Hess* that if the indicators of immunity point in **different** directions, the inquiry is whether a finding of immunity would implicate

8. PRCCCC also argues that the First Circuit's approach conflicts with the other circuits. This argument is addressed in section II, *infra*.

the state's dignity or financial solvency. 513 U.S. at 47. This is exactly what occurred here: the First Circuit determined that the factors relied upon pointed in different directions (*i.e.*, some favored and some disfavored a finding of immunity); therefore, it was necessary under *Hess* to proceed to the second step of the analysis and ask whether there would be an impact on the state treasury.[9]

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9. The First Circuit also considered the impact on the state's dignity interest:

> We start with the larger Eleventh Amendment doctrine. . . . The . . . Supreme Court has said that it is not just the state's interest in its public treasury which is at stake in the assertion of Eleventh Amendment immunity. The state also has a 'dignity' interest as a sovereign in not being haled into federal court. . . . These twin goals of the Eleventh Amendment—protection of the state's treasury and of its [dignity] interests—explicitly govern the arm-of-the-state analysis.
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> * * *
>
> The first step of the analysis [how the state structures an entity] . . . pays deference to the state's [dignity interest] in extending or withholding Eleventh Amendment immunity from an entity.

App. at 11a, 15a (citations omitted). The Second Circuit has taken a similar approach. *See Mancuso v. New York State Thruway Auth.*, 86 F.3d 289, 296 (2d Cir. 1996), *cert. denied*, 519 U.S. 992 (holding that subjecting Thruway Authority to suit in federal court would not be an affront to the state of New York where Thruway existed independently from state; was not under significant state control; and was self-funded).

D. The First Circuit Properly Considered the Impact on the State Treasury

PRCCCC argues that the First Circuit improperly applied the second step of the *Hess* analysis by requiring that a state provide most, if not all, of the operating funds of an entity. PRCCCC has again misinterpreted the First Circuit's holding and — consistent with past practices — distorted the factual record in this case.

The First Circuit — like nearly every other circuit — places great weight on whether or not a judgment will be paid out of the state's treasury. PRCCCC complains, however, that the court took a "cramped temporal view" by focusing only on the Commonwealth's most recent appropriations and requiring that PRCCCC be entirely dependent on the Commonwealth. In so doing, PRCCCC misrepresents the First Circuit's opinion. The First Circuit did **not** disregard PRCCCC's fiscal history; to the contrary, it relied upon this history in concluding that PRCCCC's financial dependence on the Commonwealth was minimal. Likewise, nowhere did the First Circuit hold that an entity must be **entirely** dependent upon the state's financial resources before qualifying for immunity; it did, however, correctly require **greater** financial dependence than was illustrated by PRCCCC.

It is PRCCCC who is asking this Court to view its financial "dependence" in a vacuum, urging this Court to overturn the First Circuit decision on the basis that **ten** years ago, the Commonwealth contributed 64% of PRCCCC's operating revenues.[10] PRCCCC, however, completely ignores

10. This figure is misleadingly high, as it includes **both** legislative appropriations and insurance reimbursements which flow to all hospitals. App. at 34a-35a.

the following evidence — recognized by the First Circuit — all of which weighs **against** a finding that the Commonwealth would be liable legally or financially for PRCCCC's debts:

- The enabling statute does not provide for the funding of PRCCCC's debts. App. at 31a.

- The Commonwealth is free to provide or not provide funds to PRCCCC, as it sees fit, and has expressly provided for independent sources of funding. *Id.*

- The Commonwealth has provided for independent sources of revenue, authorizing that PRCCCC to, among other things, borrow money; sell its services and materials to private entities; request and accept grants; and enter partnerships, joint ventures or associations with others. App. at 31a-32a.

- PRCCCC's revenues consist, in large part, of fees for patient services received from private insurance companies as well as the public Medicare and Medicaid programs — just as revenues come into private hospitals in Puerto Rico. App. at 34a.

- State funding has diminished significantly with each passing year, with the majority of funding increasingly coming from sources other than the state treasury. Legislative appropriations amounted to less than 14% of PRCCCC's total revenues from fiscal years 1993 to 2001, and in the fiscal years 2001 and 2002, PRCCCC received **no** legislative appropriations. App. at 31a, 33a-35a.

- Nothing distinguishes PRCCCC's debt from that of other private institutions. App. at 35a-36a.

PRCCCC also argues that the First Circuit focused only on whether the Commonwealth would be financially responsible for a judgment and failed to consider the Commonwealth's potential "legal" liability. This argument is misplaced. The requirement that courts consider not only the financial but the legal liability of a judgment was meant to address a situation such as that in *Regents*, where a state, although liable, might avoid dipping into the fisc because a third party has agreed to indemnify the loss. This situation is not present here. Moreover, the First Circuit's analysis expressly considered whether the state would be obligated to pay a judgment **both legally and practically**. App. at 30a. As set forth above, PRCCCC simply failed to offer adequate evidence to support the conclusion that the Commonwealth would be liable — legally or financially — for a judgment against PRCCCC.

II. The Circuits Are In Substantial Harmony

PRCCCC also seeks review on the premise that the circuits are split as to the application of *Hess*, in particular the weight to be accorded each of the factors under the first part of the analysis. A review of the circuits' Eleventh Amendment jurisprudence reveals that PRCCCC's argument lacks merit and its Petition should be denied. There is no division among the circuits.

Although there is understandably some slight variation among the circuits regarding the number of factors, the grouping of factors, and the order of analysis, the circuits are consistent in evaluating the **relationship** between the state and a particular entity for immunity purposes. Thus, while some courts have analyzed more critically the manner in which to apply the various factors relevant to the

determination of Eleventh Amendment immunity, since *Hess* the circuits have uniformly held that where the structural analysis creates ambiguity, the most important factor is whether the potential payment will come from the state treasury. *Duke*, *supra*, 127 F.3d at 974 n.4; *see Mancuso*, *supra*, 86 F.3d at 293 (where the factors are in "equipoise," the determination is guided by the twin reasons for the Eleventh Amendment); *Carter*, *supra*, 181 F.3d at 347 (weighing several factors to determine if an entity is an arm of the state and holding that the most important question is whether judgment would be paid from state treasury); *Harter*, *supra*, 101 F.3d at 338 (in determining entitlement to Eleventh Amendment immunity, a number of factors must be considered but state treasury factor is most important); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 327 (5th Cir. 2002) (same); *Alkire v. Irving*, 330 F.3d 802, 813 (6th Cir. 2003) (first and most important factor under *Hess* is whether state would be legally liable for a judgment); *Hadley v. North Ark. Community Technical College*, 76 F.3d 1437, 1439 (8th Cir. 1996) (arm of the state analysis requires court to consider degree of local autonomy and control and, more importantly, whether judgment will be paid from state treasury); *Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002), *cert. denied*, 154 L. Ed. 2d 1023 (2003) (first and most important factor is whether judgment would be satisfied out of state funds); *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000) (most important step in analysis, after characterization of state law and state control, is state treasury's liability); *Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2002) (recognizing source of funding and responsibility for judgments as most dispositive factor); *but cf. Thiel*, *supra*, 94 F.3d at 401-03 (questioning emphasis on impact to state treasury in light of *Seminole Tribe* and finding it unnecessary

to consider whether judgment would be satisfied by state where other factors established immunity).

Moreover, all of the circuits rely on the factors enunciated in *Hess* (the extent of state control, characterization of the entity under state law, and functions performed by the entity). Any perceived difference is a dispute over semantics. For instance, the state "control" criterion is referred to as the "autonomy" factor in the Third, Fourth, Fifth and Sixth Circuits; and distilled into two factors (appointment of entity members and state veto power) in the Second Circuit.[11] Furthermore, even though the order of analysis slightly differs by circuit, the result reached is not affected. There is neither a direct conflict between circuits or considerable disagreement among the circuits. The factors applied, and the weight given to each of them, are in substantial harmony. The slight "differences" in the circuits' application of the *Hess* factors do not constitute a bona fide division warranting Supreme Court review.[12]

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11. For other examples of how the circuits have characterized the *Hess* factors, a summary in the form of a chart has been appended for the Court's convenience.

12. *See Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 776 (1994) (state supreme court decision "directly at odds" with federal proceeding); *Central Bank, N.A. v. First Interstate Bank*, 511 U.S. 164 (1994) (cert granted to resolve "continuing confusion"); *Hagen v. Utah*, 510 U.S. 399, 409 (1994) (cert granted to resolve "direct conflict" between decisions); *Morgan v. Illinois*, 504 U.S. 719 (1992) (cert granted because of "considerable disagreement" among courts); *Ring v. Arizona*, 536 U.S. 584 (2002) (cert granted to "allay uncertainty" in lower courts caused by "manifest tension" between earlier decisions).

PRCCCC's suggestion that the Court should **reconsider** whether a state's potential liability for a judgment remains the most significant factor in light of post-*Hess* decisions does not warrant consideration. According to PRCCCC, the deciding factor should be whether a state's "dignity" will be affronted. PRCCCC's argument misses the point. There is no dispute that protecting a state's dignity is an underlying concern, or rationale, of the Eleventh Amendment. *Hess*, 513 U.S. at 39 ("'The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity'") (citations omitted). The dignity interest is not, however, an independent "factor" or "indicia" of immunity. Indeed, this notion begs the very question being asked. A state's interest in sovereign immunity cannot be affronted, where as here, the entity is not an arm of the state. The post-*Hess* cases that PRCCCC relies upon (*Federal Maritime* and *Seminole Tribe*) do not alter this Court's jurisprudence concerning the determination of whether an entity is an arm of the state for purposes of Eleventh Amendment immunity. As explained above, those cases do not address **to whom** Eleventh Amendment immunity applies. Rather, they address the application of Eleventh Amendment immunity in circumstances not present here and leave undisturbed the pronouncement in *Hess* and *Regents* that state financial liability is the "most salient factor." What PRCCCC is advocating — recognizing that it cannot meet the test for Eleventh Amendment immunity — is not a clarification of existing law. It is advocating that this Court **change** the arm-of-the-state analysis established in *Hess* and *Regents*.

III. PRCCCC's Status As A Special Purpose Health Care Facility Does Not Entitle It To Arm-Of-The-State Status

PRCCCC argues that the First Circuit "effectively ruled" that a public corporation that provides health care services would **never** be entitled to Eleventh Amendment immunity, and that the First Circuit's analysis, if adopted, "would categorically disqualify a sweeping array of public health initiatives pursued by states." Petition at 19-20. This argument is unfounded and should be rejected.

The First Circuit's opinion does not hold what PRCCCC claims nor does it threaten such wide-reaching implications. Although the court found that **PRCCCC** was not distinguishable from a private sector hospital and did not serve a uniquely governmental function, it did not hold that Eleventh Amendment immunity could **never** be granted to a special purpose public corporation.

PRCCCC argued to the First Circuit that it functioned as a governmental agency for three reasons: (1) PRCCCC was created to comply with the Commonwealth's obligation to provide health care to indigent residents; (2) PRCCCC's enabling statute provides that it is responsible for establishing public policy relating to the provision of cardiovascular services; and (3) PRCCCC's mission includes training medical students, interns and residents from the state's public university. These arguments were and are unavailing. That PRCCCC may have a "responsibility [for] . . . framing or executing public policy" does not make it part of the government. Indeed, there are numerous private organizations and charities that influence and make public policy in a variety of fields. Likewise, that PRCCCC is a training site

and research center for cardiovascular care for members of the state medical school does not make PRCCCC a public health entity. "[M]any hospitals unaffiliated with state governments (or the Commonwealth) employ (and train) interns and residents from state medical schools." App. at 28a. Finally, the First Circuit did not categorically reject PRCCCC as an arm of the state. Rather, the First Circuit considered each of PRCCCC's arguments and found them to be without merit:

> PRCCCC presents no evidence indicating that it has helped set policies applicable to other facilities in Puerto Rico. It acknowledges, moreover, that since the Commonwealth carried out a major health reform in 1993, PRCCCC had competed with private hospitals for legislative appropriations and other public funds allocated for cardiovascular surgery.
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> * * *
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> Medical care in Puerto Rico . . . is provided by a combination of private and public sector entities. Even medical care for the poor is a responsibility often imposed on private hospitals, through free care pools, Medicaid, and other devices. . . . That PRCCCC receives Medicaid funding does not distinguish it from a private sector hospital, either not-for-profit or for-profit. A mosaic of medical providers serves the poor and the uninsured, and **nothing about PRCCCC marks it as serving a uniquely governmental function**.

App. at 28a-29a (emphasis added).

In essence, PRCCCC urges this Court to hold that every medical clinic or hospital which performs any sort of public health services be deemed an arm of the state. This argument was not made to the First Circuit and, therefore, should be disregarded. *United States v. Ortiz*, 422 U.S. at 898. Moreover, there is no support for such a sweeping proposition. Whether an entity is an arm of the state is made on a case-by-case basis. *Wojcik*, 300 F.3d at 101 ("Gross generalizations about entities performing similar functions in different states are not helpful."). There is no precedent for the notion that certain types of entities should automatically qualify or be presumed to be arms of the state.

CONCLUSION

For all the foregoing reasons, FMC respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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